BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

For the statement of the case and the grounds upon which the jurisdiction of this Court is invoked reference is made to the preceding petition. The Eighth Circuit Court of Appeals erred in dismissing petitioner's petition for review, for the reasons set forth in the preceding petition.

I.

THE BOARD'S SUPPLEMENTAL DECISION AND ORDER PERTAINS SOLELY TO ALLEGED UNFAIR LABOR PRACTICES; IS THEREFORE PURSUANT TO SECTION 10 OF THE NATIONAL LABOR RELATIONS ACT; IS A FINAL ORDER AND THEREBY APPEALABLE

To adequately understand petitioner's position we believe it significant and controlling to point out here that the "charges" so made by the union in its "protest of election" are vastly different from the "protest" or "charges" made in all other types of cases where the question of jurisdiction for review has arisen and upon which the Board relied in its motion to dismiss. We believe that in no other case heretofore decided has a similar question to that which is here presented, been submitted to the courts. A review of those cases heretofore decided enables us to classify matters heretofore adjudicated generally in the following manner:

1. Claims or charges by a union that the Board had erred in the exercise of its administrative or ministerial judgment, by

(a) The determination of the choice of the collective bargaining agent (*A. F. L. vs. N. L. R. B., post; Union Premier Food Stores vs. Retail Food*

Clerks & Managers Union (C. C. A., Pa., 1938), 98 Fed. (2d) 821; *Fur Workers Union, Local No. 72 vs. Fur Workers Union No. 21238*, 105 Fed (2d) 1, certiorari granted 60 S. Ct. 78, 308 U. S. 537, affirmed 60 S. Ct. 292, 306 U. S. 522).

(b) The determination of a pre-election matter under Section 9 (d) of the Act (*N. L. R. B. vs. Falk Corporation, post*).

2. An order of the Board in a simple representation proceedings predicated upon an administrative or ministerial function (*Cupples Company Manufacturers vs. N. L. R. B., post*), contested by either the company or the union where the question of violation of the Act is not at issue (E. I. Dupont DeNemours, *post*).

The charge of the union was that the company *violated the Act*. This could mean only that the violation by the company was with respect to Section 10 of the Act. So far as Section 10 is concerned it can make no difference in its effect whether the charge had to do with violations in connection with a previous election or any other type of violation; in either event it was a charge of unfair labor practice. In fact, neither the charge nor the Supplemental Decision and Order of July 5, 1944, limits the alleged violations to the actual conduct of the election itself. They both represent and specify that the election was *lost* because the company violated the Act, but the alleged violations all are said to have occurred prior to the election, which makes the election only an incident following the course of conduct complained of.

The Supplemental Decision and Order provides:

> "We find the company's above described course of conduct *during the period preceding the election* prevented an expression by the employees therein of their free and uncoerced wishes as to representation." (Italics ours.)

Thus, it is the "course of conduct" of the company preced-

ing the election which is held to be a violation of the Act, without which findings none of these issues would now be presented. The proof thereof lies in the Board's very next sentence, which states: "We shall *therefore* set the election aside."

It is the position of the petitioner that nothing more final could have been issued by the Board than its Order pursuant to the foregoing, which reads:

> "It is hereby ordered that the election held on November 3, 1943, among the employees of David W. Onan, C. Warren Onan and Robert D. Onan, partners, d/b/a D. W. Onan & Sons, Minneapolis, Minnesota, be and it hereby is set aside."

Therefore, the only question before this Court is not whether the Board has committed error in the exercise of its administrative functions and duties pertaining to a representation proceedings under Section 9 (c) of the Act, but whether or not the company is guilty of unfair labor practices under Section 10 of the Act.

A. The Board by Its Joinder and Severance of Cases Cannot Arbitrarily Control the Matter at Issue and Thereby Deny to Petitioner Its Right of Review.

The union filed two sets of charges. It is evident that the charges contained in the two sets were identical as appears from the letter of Regional Director Schields of December 2, 1943. He states in that letter: "In the meantime I would be glad if you would state your position with reference to the allegations of the charge, *which are the same as the allegations made in the Protest of Election.*" (Italics ours.)

When the two sets of charges were filed, the Board entered a new case number, namely, Case No. 18-C-998 for one set of charges, and filed the other in Case No. 18-R-822, which was the representation proceedings. Under date of January

1, 1944, the Board then entered its Order directing hearing on both sets of charges, and entitled the notice in both numbered cases. It was evident, therefore, that not only Regional Director Schields, but Mr. Lawyer, Chief of the Order Section of the Board, considered the charges *identical* and that they should be heard in one proceeding.

However, without notice, and without any apparent reason for so doing, Mr. Mantel, Acting Chief of the Order Section of the Board, entered an order on January 20, 1944, severing the two cases. The reason for making this severance was that the Board had considered and deemed it necessary so to do "in order to effectuate the purposes of the Act." It is quite inconceivable how the purposes of the Act could be effectuated by a severance of the two cases, since they were based on identical charges.

In the order *consolidating* the cases identically the same words were used, namely, that the Board deemed it "necessary (to consolidate them) in order to effectuate the purposes of the Act." We have then on January 1, 1944, the necessity of consolidating the cases to effectuate the purposes of the Act and (20 days later) on January 20, 1944, the necessity of severing them in order to accomplish the same purpose. It is a fact that no additional charges had been filed in the meantime and the two Orders were predicated on the same existing facts.

The hearing upon which the Supplemental Decision and Order was entered happens to carry the same number as the representation proceedings, namely, Case No. 18-R-822. The *numbering* on the case cannot be made controlling on the right of review of the Supplemental Decision and Order, if, as has already been pointed out, the matter before the Board at the hearing was a charge of unfair labor practice and not a charge that error had been committed in the representation proceedings. In other words, the turn of the wrist and

the scratch of the pen of the Board cannot be permitted to deprive a party adversely affected by the Supplemental Decision and Order from his right of review by this Court.

II.

APPLICABLE LAW DISTINGUISHES BETWEEN ADMINISTRATIVE ORDERS UNDER SECTION 9 AND ORDERS PREDICATED UPON FINDINGS UNDER SECTION 10

The case of *American Federation of Labor vs. National Labor Relations Board*, 308 U. S. 401, came up on petition for writ of certiorari to review a judgment dismissing for want of jurisdiction a petition to review the certification by the National Labor Relations Board of an organization of longshoremen as representative of workers. The Court said:

> "The question decisive of the case is whether a certification by the National Labor Relations Board under Sec. 9 (c) of the Wagner Act, 49 Stat. 449, 453, 29 U. S. C., Supp. IV, Secs. 151-166, that a particular labor organization of longshore workers is the collective bargaining representative of the employees in a designated unit * * * is reviewable by the Court of Appeals for the District of Columbia by the procedure set up in Sec. 10 (f) of the Act."

The Court of Appeals dismissed the petition as not within the jurisdiction to review orders of the Board conferred upon it by Section 10 of the Wagner Act. Affirmed.

The question, therefore, of whether an order may be reviewable by appeal to the courts *after* administrative duties and functions of the Board has *ceased* and a decision and order is made predicated upon a *violation* of the National Labor Relations Act, does not even arise in that case. There was no claim, in that case, of a violation of the *Act* by *any* party—merely a claim that the Board had erred in exercising its administrative or ministerial judgment. It is exactly

analogous to those cases whereby a municipal governing body, in the exercise of its administrative duties, decides a matter *one* way when it could have, in the exercise of its judgment or discretion, decided another way. Such administrative *decisions* cannot be attacked. However, where the same body takes action, either affirmatively or negatively, predicated upon and *charging* violation of a *law, that* action is reviewable.

If this were not so, and if it is not so here, then there is no guarantee against arbitrary action by the Board. Then the Board itself becomes not an administrative, ministerial or fact finding body—but a combination of these and a court. That Congress, in passing the Act, had no such purpose in mind, appears obvious, and we quote from a note at page 410 of the above cited case.

> "There is no more reason for court review prior to an election than for court review prior to a hearing. But if subsequently the Board makes an *Order* predicated upon the election, such an order to bargain collectively with elected representatives, then the entire election procedure becomes part of the record upon which the order of the Board is based, and is fully reviewable by an aggrieved party in the Federal Courts in the manner provided in Sec. 10. And this review would include within its scope the action of the Board in determining the appropriate unit for purposes of the election. This provides a complete guarantee against arbitrary action by the Board."
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> Sen. Rep. 573, *Committee on Education and Labor*, 74th Cong., 1st Sess., p. 14.

In the case at bar the Board has gone one step further than it did in the American Federation of Labor case just cited. It has issued an order which is final, and which is the *last* act it could do. Whereas, in the American Federation of Labor case it had not as yet taken its final step. Had it done so, it is obvious that the order would then have been reviewable.

A. There Is No Conflict Between Cases Cited by the Board and Petitioner's Position. The Test Is Whether or Not There Has Been Issued an Order Predicated Upon the Results of an Election.

The case of *National Labor Relations Board vs. Independent Brotherhood of Electrical Workers*, 308 U. S. 413, is a companion case to that of the *American Federation of Labor vs. National Labor Relations Board, supra*. In the last cited case the question was whether a direction for an election made by the National Labor Relations Board in a representation proceedings under Section 9 (c) of the Wagner Act is reviewable by a Circuit Court of Appeals. Held: Not reviewable.

Distinguishment between this case and that at bar is exceedingly simple. In the cited case the Board had merely issued its "direction" for a run-off election, stating that in its opinion the question of representation (between competing unions) could best be solved in that manner. Such a "direction" is obviously not reviewable. The only question for review in the cited case is whether the Board has correctly exercised its administrative duties in selecting the correct union to be voted upon in the election *to be held* as a result of the Board's "direction of election." In the case at bar the election had been held. The petitioner's contention is—not that the Board has made an erroneous choice of administrative options—but that there has been no violation of the Act.

The case of *National Labor Relations Board vs. Falk Corp.*, 308 U. S. 453, was a case wherein, in consolidated proceedings against an employer under the National Labor Relations Act, the Board, under Section 10 (c), ordered the employer to cease and desist from interference with and domination of a labor union of its employees, to completely disestablish such union, and to post notices of compliance

with the Board's order; and, under Section 9 (c), directed an election of a representative for collective bargaining on a ballot containing the names of two competing unions but omitting the company union. The Circuit Court of Appeals granted enforcement, providing that the employees should be free at any election to choose the company union to represent them, and that the employer be permitted to add to the posted notices the qualifications that the company union would be disestablished and unrecognized until and unless it should be chosen by the employees to represent them.

Held: The Circuit Court of Appeals was without power thus to modify, and was without jurisdiction under Section 9 (d) to review the Board's direction of an election.

This case is easily distinguishable from the one at bar by the language of the Court itself at page 459:

> "Here, the Board's order that the employer cease its unfair practices, disestablish the company union and post notices was not 'based in whole or in part upon facts certified' as the result of an election or investigation made by the Board pursuant to Sec. 9 (c). The proposed election here has not even been held and consequently no certification of a proper bargaining agent has been made by the Board. Until that election is held, there can be no certification of a bargaining representative and no Board order—based on a certification—has been or can be made, so as to invoke the court's powers under 9 (d).
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> "The fundamental error of the court below lay in its assumption that there was before it 'for final disposition, the matter of the selection of the bargaining agent.' The court has no right to review a proposed election and in effect to supervise the manner in which it shall thereafter be conducted. There can be no court review under 9 (d) until the Board issues an order and requires the employer to do something predicated upon the result of an election.
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> "Since this employer has not been ordered by the Board to do anything predicated upon the results of an election the court had no authority to act under 9 (d)."

But in addition to these words of the Court it is significant to note, that the only question in controversy has to do with Section 9 (d) and not, as in the case at bar, with Section 10.

In *Cupples Co. Mfgrs. vs. National Labor Relations Board*, 106 Fed. (2d) 100, there was no connection between the principles there involved and that at bar. In fact, the Court states at page 104:

> "There are no questions growing out of the representation cases now before us for review, for the reason that the Board has made no final order with respect to representation in the match department."

These were simply proceedings by the company to review and set aside an order of the National Labor Relations Board, which order was vacated in part and affirmed in part. The question of the jurisdiction of the Court was not even raised.

E. I. DuPont de Nemours & Co. vs. National Labor Relations Board, 116 Fed. (2d) 388, came up on petition to review and set aside an order of the Board and to review a direction of election issued by the Board. While holding the Order of the Board reviewable, and reviewing it, and refusing to review the direction of election, the Court said, as it did in the other cases cited:

> "A Circuit Court of Appeals has no right to review a *proposed* election and in effect to supervise the manner in which it shall thereafter be conducted."

Nevertheless, the Court did review the Order of the Board, which Order *charged* violations of the Act.

Inland Container Corp. vs. National Labor Relations Board, 137 Fed. (2d) 642, distinguishes itself very readily from the case at bar, and may be disposed of by these words of the Court at page 643:

> "The only question here is whether this court has jurisdiction to order additional evidence to be taken in a Labor Board proceeding in which the only action taken

> by the Board is the direction of an election. We think it has not."

The Court, however, in distinguishing the two principal functions of the Board says:

> "Only under Sec. 10 may application be made to the Circuit Court of Appeals: under subsec. (e) by the Board for enforcement of an order involving an unfair labor practice; and under subsec. (f) by an aggrieved person for review of such an order. No provision is made for review by the Circuit Court of Appeals of proceedings under Sec. 9, except where the results of an investigation under Sec. 9, in whole or in part form the basis for an order of the Board involving an unfair labor practice under Sec. 10."

The distinguishing feature of Inland Container Corp., *supra*, is that the proceedings were solely on a petition for leave to adduce certain evidence excluded by the trial examiner. In other words, the proceedings themselves were not complete, there had been no certification, but, most important, no order of any kind, final or otherwise, had as yet been made by the Board. Whereas, in the case at bar everything had been completed and a final order had been made.

In *Wilson & Co. vs. National Labor Relations Board*, 120 Fed. (2d) 913, 915, the *facts* differ from the facts of the case at bar. There, charges were filed by the union upon which complaint issued, predicated upon Section 10 of the Act. In the meantime, a separate representation proceedings was filed by the union under Section 9, and consolidated by Order of the Board. This resulted in a direction that an election be held. In the petition for review, petitioner sought to review and set aside the direction of election. *But—there had been no previous decision and Order by the Board predicated upon an election held and that there had been unfair labor practices indulged in by the company, as is the situation in the case at bar. The entire basis of the* Supplemental

Decision and Order in the case at bar is that there have been unfair labor practices indulged in.

In *Bethlehem Shipbuilding Corp. vs. National Labor Relations Board*, 114 Fed. (2d) 930, 935, as in the foregoing case, the procedural facts differ from the case at bar and the case is not in point. There, the petitioners asked for a review of the complaint case and of a review of the petitions filed by the union under Section 9 of the Act asking for certification of collective bargaining representatives. While the petition for review as to the charges filed under Section 9 were denied on the same grounds as in the cases cited, *supra*, an election had not been held, nor order made upon said election as in the case at bar.

Utah Copper Co. vs. National Labor Relations Board, 136 Fed. (2d) 485, is also reconcilable on the same grounds as the other cases cited. Moreover, the Court stated:

> "This court cannot review an order directing an election nor a certification of the bargaining representative. There can be no court review under Sec. 10 (f) until the Board issues an order and requires the employer to do something predicated upon the result of an election."

A fortiori—if the Board issues an order requiring the employer to do something predicated upon the result of an election, it is reviewable. In the case at bar an election was held. The union lost. It filed charges of violation of the Act. Hearings were had. The Board decreed the result of the election was influenced by violations of the Act antedating the election. The Board determined that the company had violated the Act. The Board determined that the violations had affected the result of an election. A new election is ordered as a result of the alleged violation. The National Labor Relations Board now says "no order of any kind has been directed against petitioners requiring them to do anything." If this were so, the company could ignore the Order

and refuse to hold the requested election. But if it does, proceedings may be taken to adjudge petitioner in contempt. We find no case that holds with the Board's curious contention, nor sustains the Circuit Court of Appeals in its judgment of dismissal.

Millis vs. Inland Empire District Council, 14 L. R. R. 711, is not in point, even with the preceding cases. The only point involved was whether or not there could be a judicial review of the Board's certification, following an election, of the collective bargaining representatives of certain employees. Nothing further had transpired beyond the Board's refusal to certify the C. I. O. as the proper bargaining agent.

CONCLUSION

The Circuit Court of Appeals has therefore failed to recognize the principles herein set forth, and to distinguish the cases herein cited from the situation in the case at bar. In doing so, the Circuit Court of Appeals has erred with respect to applicable law. The precise points involved in the case at bar have not been decided heretofore, and should be decided by the Supreme Court.

If petitioner should be barred from the review requested the result will be to allow an administrative body (the National Labor Relations Board) to arbitrarily determine an aggrieved party's right of review contrary to the express provisions of the National Labor Relations Act and contrary to the intent of the Congress.

Respectfully submitted,

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